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4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF WASHINGTON

6 ADAIR MARIE ROSE, )  
7 Plaintiff, ) No. CV-10-119-JPH  
8 v. ) ORDER GRANTING PLAINTIFF'S  
9 MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
10 of Social Security, ) AND REMANDING FOR FURTHER  
11 Defendant. ) ADMINISTRATIVE PROCEEDINGS  
12 )  
13 )

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14 BEFORE THE COURT are cross-motions for summary judgment noted  
15 for hearing without oral argument on April 8, 2011 (Ct. Rec. 14,  
16 17). Attorney Maureen J. Rosette represents Plaintiff; Special  
17 Assistant United States Attorney Gerald J. Hill represents the  
18 Commissioner of Social Security (Commissioner). The parties have  
19 consented to proceed before a magistrate judge (Ct. Rec. 8). On  
20 March 29, 2011, plaintiff filed a reply (Ct. Rec. 19). After  
21 reviewing the administrative record and the briefs filed by the  
22 parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment  
23 (Ct. Rec. 14) and remands for further administrative proceedings.  
24 Defendant's Motion for Summary Judgment (Ct. Rec. 17) is **DENIED**.

25 **JURISDICTION**

26 Plaintiff applied for disability insurance benefits (DIB) on

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1 January 7, 2009, alleging disability beginning May 1, 2006 (Tr.  
2 111-112). The application was denied initially and on  
3 reconsideration (Tr. 69-71, 77-79).

4 At a hearing before Administrative Law Judge (ALJ) Paul T.  
5 Hebda on September 22, 2009, plaintiff, represented by counsel,  
6 her spouse, and medical and vocational experts testified (Tr. 29-  
7 66). On October 1, 2009, the ALJ issued an unfavorable decision  
8 (Tr. 10-20). The Appeals Council denied review on March 5, 2010  
9 (Tr. 1-3). Therefore, the ALJ's decision became the final decision  
10 of the Commissioner, which is appealable to the district court  
11 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for  
12 judicial review pursuant to 42 U.S.C. § 405(g) on April 19, 2010  
13 (Ct. Rec. 1,4).

#### 14 **STATEMENT OF FACTS**

15 The facts have been presented in the administrative hearing  
16 transcript, the ALJ's decision, and the briefs of the parties.  
17 They are briefly summarized here where relevant.

18 Plaintiff was 58 years old at the hearing. She graduated from  
19 high school and completed a year of college (Tr. 40, 131). Ms.  
20 Rose has worked as a file clerk, receptionist, and document  
21 scanner (Tr. 41-44, 58-59, 127, 149, 190-192). In June 2006, she  
22 underwent a lumpectomy followed by radiation for breast cancer.  
23 She has hypertension and a liver cyst. Ms. Rose testified she can  
24 walk four blocks and lift five pounds (Tr. 46-48). Her heart beats  
25 rapidly. She has fatigue, nausea, trouble sleeping, memory  
26 problems, anxiety, and depression (Tr. 35, 44-48, 50, 55).

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**SEQUENTIAL EVALUATION PROCESS**

The Social Security Act (the Act) defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if any impairments are of such severity that a plaintiff is not only unable to do previous work but cannot, considering plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is engaged in substantial gainful activities. If so, benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(I). If not, the decision maker proceeds to step two, which determines whether plaintiff has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

If plaintiff does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment

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1 is severe, the evaluation proceeds to the third step, which  
2 compares plaintiff's impairment with a number of listed  
3 impairments acknowledged by the Commissioner to be so severe as to  
4 preclude substantial gainful activity. 20 C.F.R. §§  
5 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P,  
6 App. 1. If the impairment meets or equals one of the listed  
7 impairments, plaintiff is conclusively presumed to be disabled.  
8 If the impairment is not one conclusively presumed to be  
9 disabling, the evaluation proceeds to the fourth step, which  
10 determines whether the impairment prevents plaintiff from  
11 performing work which was performed in the past. If a plaintiff is  
12 able to perform previous work, that Plaintiff is deemed not  
13 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
14 this step, plaintiff's residual functional capacity (RFC)  
15 assessment is considered. If plaintiff cannot perform this work,  
16 the fifth and final step in the process determines whether  
17 plaintiff is able to perform other work in the national economy in  
18 view of plaintiff's residual functional capacity, age, education  
19 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
20 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

21 The initial burden of proof rests upon plaintiff to establish  
22 a *prima facie* case of entitlement to disability benefits.  
23 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
24 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
25 met once plaintiff establishes that a physical or mental  
26 impairment prevents the performance of previous work. *Hoffman v.*

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1 *Heckler*, 785 F.3d 1423, 1425 (9<sup>th</sup> Cir. 1986). The burden then  
2 shifts, at step five, to the Commissioner to show that (1)  
3 plaintiff can perform other substantial gainful activity and (2) a  
4 "significant number of jobs exist in the national economy" which  
5 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
6 Cir. 1984); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (1999).

7 **STANDARD OF REVIEW**

8 Congress has provided a limited scope of judicial review of a  
9 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
10 the Commissioner's decision, made through an ALJ, when the  
11 determination is not based on legal error and is supported by  
12 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
13 Cir. 1985); *Tackett*, 180 F.3d at 1097 (9<sup>th</sup> Cir. 1999). "The  
14 [Commissioner's] determination that a plaintiff is not disabled  
15 will be upheld if the findings of fact are supported by  
16 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
17 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is  
18 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
19 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.

20 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
21 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
22 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
23 evidence as a reasonable mind might accept as adequate to support  
24 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
25 (citations omitted). "[S]uch inferences and conclusions as the  
26 [Commissioner] may reasonably draw from the evidence" will also be

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1 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On  
2 review, the Court considers the record as a whole, not just the  
3 evidence supporting the decision of the Commissioner. *Weetman v.*  
4 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(*quoting Kornock v.*  
5 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

6 It is the role of the trier of fact, not this Court, to  
7 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
8 evidence supports more than one rational interpretation, the Court  
9 may not substitute its judgment for that of the Commissioner.  
10 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
11 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial  
12 evidence will still be set aside if the proper legal standards  
13 were not applied in weighing the evidence and making the decision.  
14 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,  
15 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to  
16 support the administrative findings, or if there is conflicting  
17 evidence that will support a finding of either disability or  
18 nondisability, the finding of the Commissioner is conclusive.  
19 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### 20 ALJ'S FINDINGS

21 The ALJ found plaintiff met the DIB requirements through June  
22 30, 2008 (Tr. 10, 12). At step one he found Ms. Rose did not  
23 engage in substantial gainful activity after onset (Tr. 12). At  
24 steps two and three, ALJ Hebda found plaintiff suffers from status  
25 post breast cancer and status post breast cancer treatment,  
26 impairments that are severe but which do not alone or in

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1 combination meet or medically equal a Listed impairment (Tr. 12,  
2 17). The ALJ found plaintiff less than completely credible (Tr.  
3 19). At step four, relying on the VE, he found plaintiff's RFC for  
4 a wide range of light work enables her to perform three of her  
5 past jobs: file clerk, receptionist, and document scanner (Tr. 19,  
6 59). Accordingly, he found plaintiff is not disabled as defined by  
7 the Social Security Act (Tr. 20).

#### 8 ISSUES

9 Plaintiff contends the Commissioner erred when he failed to  
10 credit the opinions of Drs. Gardner, Guthrie, and Arnold, and when  
11 he found her less than fully credible (Ct. Rec. 15 at 10-18).  
12 Asserting the ALJ's decision is supported by substantial evidence  
13 and free of legal error, the Commissioner asks the Court to affirm  
14 (Ct. Rec. 18 at 2). The first issue is dispositive.

#### 15 DISCUSSION

##### 16 A. Weighing medical evidence

17 In social security proceedings, the claimant must prove the  
18 existence of a physical or mental impairment by providing medical  
19 evidence consisting of signs, symptoms, and laboratory findings;  
20 the claimant's own statement of symptoms alone will not suffice.  
21 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
22 on the basis of a medically determinable impairment which can be  
23 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
24 medical evidence of an underlying impairment has been shown,  
25 medical findings are not required to support the alleged severity  
26 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cr.

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1 1991).

2 A treating physician's opinion is given special weight  
3 because of familiarity with the claimant and the claimant's  
4 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir.  
5 1989). However, the treating physician's opinion is not  
6 "necessarily conclusive as to either a physical condition or the  
7 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
8 751 (9<sup>th</sup> Cir. 1989)(citations omitted). More weight is given to a  
9 treating physician than an examining physician. *Lester v. Chater*,  
10 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Correspondingly, more weight is  
11 given to the opinions of treating and examining physicians than to  
12 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592  
13 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions  
14 are not contradicted, they can be rejected only with clear and  
15 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the  
16 ALJ may reject an opinion if he states specific, legitimate  
17 reasons that are supported by substantial evidence. See *Flaten v.*  
18 *Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir.  
19 1995).

20 In addition to the testimony of a nonexamining medical  
21 advisor, the ALJ must have other evidence to support a decision to  
22 reject the opinion of a treating physician, such as laboratory  
23 test results, contrary reports from examining physicians, and  
24 testimony from the claimant that was inconsistent with the  
25 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
26 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>

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1 Cir. 1995).

2 **B. Mental limitations**

3 Plaintiff alleges the ALJ should have credited the opinions  
4 of examining psychologist John Arnold, Ph.D., and treating doctors  
5 Gardner and Guthrie (Ct. Rec. 15 at 11-15). Had the ALJ properly  
6 credited these opinions, plaintiff asserts, the ALJ would have  
7 found at step two she suffers the severe mental impairment of  
8 anxiety.

9 The Commissioner answers that an ALJ's error, if any, at step  
10 two is harmless if substantial evidence supports the RFC, or if  
11 the claimant shows the ALJ failed to account for limitations  
12 resulting from the impairment (here, anxiety) in the RFC (Ct. Rec.  
13 18 at 6), citing *Burch v. Barnhart*, 400 F.3d 676, 682 (9<sup>th</sup> Cir.  
14 2005); 20 C.F.R. § 404.1521; 20 C.F.R. § 404.1545.

15 The ALJ did not include any mental limitations in his RFC  
16 assessment (Tr. 18). He observes plaintiff testified she currently  
17 takes medication for anxiety, but there is no evidence she did so  
18 during the relevant period (Tr. 19).

19 The ALJ erred.

20 In November 2006, treating doctor Timothy Gardner, M.D.,  
21 noted complaints of episodic feelings of doom and crying spells  
22 due to "frustration from her inability to feel well." He opined it  
23 was possible some of her symptoms were related to panic attacks  
24 and a generalized anxiety disorder. Dr. Gardner prescribed  
25 citalopram and alprazolam on December 15, 2006, about seven months  
26 after onset (Ct. Rec. 15 at 12, citing Tr. 300-301). In July 2007,

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1 plaintiff continued to suffer anxiety problems. Dr. Gardner  
2 prescribed lorazepam and sertraline (Ct. Rec. 15 at 12, citing Tr.  
3 372).

4 In October 2007, treating doctor Carol Guthrie, M.D., noted  
5 complaints of increased depression, and anxiety which was  
6 increasingly debilitating (Ct. Rec. 15 at 12, citing Tr. 272).  
7 Plaintiff points out Dr. Gardner's records in December 2007 and  
8 January 2008 reflect complaints of "worrying all the time" despite  
9 taking lexapro and citalopram. In July 2008, just after her last  
10 insured date, plaintiff felt anxious and forgetful. She was having  
11 frequent nightmares. Dr. Gardner adjusted the psychotropic  
12 medications (Ct. Rec. 15 at 14, citing Tr. 370-371).

13 The error by the ALJ is not harmless.

14 If there are unresolved issues and the record does not  
15 clearly require a finding of disability, the court should remand  
16 for further administrative proceedings to remedy defects in the  
17 original administrative proceedings. *Holohan v. Massanari*, 246  
18 F.3d 1195, 1210 (9<sup>th</sup> Cir. 2001); *Smolen v. Chater*, 80 F.3d 1273,  
19 1281 (9<sup>th</sup> Cir. 1996); *McAllister v. Sullivan*, 888 F.2d 599, 603  
20 (9<sup>th</sup> Cir. 1989)). The decision whether to remand for further  
21 proceedings or for an award of benefits is within the Court's  
22 discretion. *Harman v. Apfel*, 211 F.3d 1172, 1177 (9<sup>th</sup> Cir. 2000);  
23 *Reddick v. Chater*, 157 F.3d 715, 728 (9<sup>th</sup> Cir. 1989).

24 The ALJ erred when he determined plaintiff did not take  
25 psychotropic medications during the relevant period. Because he  
26 found no severe mental impairment at step two, and his RFC  
27 included no mental limitations, the ALJ's step two determination

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1 is not supported by the record, necessitating remand for further  
2 administrative proceedings.

3 **C. Physical limitations**

4 Dr. Vu testified Ms. Rose has an RFC for light work. He  
5 opined plaintiff's medication (tamoxifen) likely has caused  
6 fatigue since December 2006 (Tr. 36-37). On remand the record  
7 should be fully developed with respect to the effects of fatigue  
8 during the relevant period.

9 The court expresses no opinion as to what the ultimate  
10 outcome will or should be. The fact-finder is free to give  
11 whatever weight to the evidence is deemed appropriate. *See Sample*  
12 *v. Schweiker*, 694 F.2d 636, 642 (9<sup>th</sup> Cir. 1982) ("Questions of  
13 credibility and resolution of conflicts in the testimony are  
14 functions solely of the Secretary").

15 **CONCLUSION**

16 Having reviewed the record and the ALJ's conclusions, this  
17 court agrees the ALJ's decision is not free of legal error and ,  
18 but finds there are unresolved issues and the record does not  
19 clearly require a finding of disability.

20 Accordingly,

21 **IT IS ORDERED:**

22 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is  
23 **GRANTED**. The matter is **REVERSED and REMANDED** for further  
24 proceedings consistent with this decision and sentence four of 42  
25 U.S.C. § 405(g).

26 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is  
27 **DENIED**.

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1 The District Court Executive is directed to file this Order,  
2 provide copies to counsel, enter judgment in favor of Plaintiff,  
3 and **CLOSE** this file.

4 DATED this 16th day of May, 2011.

5  
6 s/ James P. Hutton

7 JAMES P. HUTTON

8 UNITED STATES MAGISTRATE JUDGE  
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